

## 46 Am. Jur. 2d Judges § 174

American Jurisprudence, Second Edition | February 2022 Update

### Judges

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### IX. Disqualification to Act in Particular Case

#### C. Remedies and Procedure

#### 2. Time for Objection

## § 174. Excuse for delay in raising judicial disqualification

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Judges](#) 51(2)

### A.L.R. Library

[Time for asserting disqualification of judge, and waiver of disqualification, 73 A.L.R.2d 1238](#)

Generally, unless the grounds for recusal are unknown to the party at the time of the proceeding and are newly discovered, there can be no excuse for delaying the filing of the motion until after rulings are made in the cause, particularly where the rulings are adverse to the movant.<sup>1</sup>

If the basis for recusal is not apparent, then even in the face of statutory limits, the litigant preserves the issue by promptly filing the motion when the basis for recusal comes to light.<sup>2</sup> In some jurisdictions, if new grounds for disqualification are discovered after the statutory time has passed, the party may move to disqualify based on the relevant canon of judicial conduct, as soon as possible after becoming aware of the new information.<sup>3</sup>

Some statutes provide that an untimely objection may be saved if good cause is shown.<sup>4</sup>

Circumstances which will excuse a delay in filing a timely disqualification motion include where the basis for disqualification was unknown until after the time limit had passed,<sup>5</sup> where the objecting party did not know which judge would preside<sup>6</sup> or

was not afforded sufficient notice of the assigned judge;<sup>7</sup> where the actions of a disqualified judge are held void;<sup>8</sup> or where the judge is constitutionally disqualified.<sup>9</sup>

In some jurisdictions, the timeliness requirement with respect to a claim for disqualification of a judge does not apply when a disqualification claim is based on bias or prejudice.<sup>10</sup> A demand for a change of judge based on bias is not subject to the time constraints applicable to a peremptory demand for a change of judge.<sup>11</sup> For instance, if a substantial ruling has been made in a case, a for-cause substitution of the judge may be granted only where the party seeking substitution can establish "actual prejudice," i.e., either prejudicial trial conduct or personal bias.<sup>12</sup>

An untimely motion to disqualify that is not overly late or obviously frivolous should be referred to another judge for a de novo decision, where delaying entry of judgment in the case would not substantially inconvenience either the court or the parties.<sup>13</sup>

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#### Footnotes

- 1 [Office of Disciplinary Counsel v. Au](#), 107 Haw. 327, 113 P.3d 203 (2005), reconsideration filed, (July 5, 2005).
- 2 [Harris v. State](#), 160 S.W.3d 621 (Tex. App. Waco 2005).
- 3 [Towbin Dodge, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark](#), 121 Nev. 251, 112 P.3d 1063 (2005).
- 4 [Eckert v. Superior Court](#), 69 Cal. App. 4th 262, 81 Cal. Rptr. 2d 467 (4th Dist.1999); [Foody v. State](#), 200 Ga. App. 230, 407 S.E.2d 469 (1991).
- 5 [Hendrickson v. Superior Court In and For Cochise County](#), 85 Ariz. 10, 330 P.2d 507, 73 A.L.R.2d 1235 (1958); [State v. Payne](#), 149 Ohio App. 3d 368, 2002-Ohio-5180, 777 N.E.2d 333 (7th Dist. Harrison County 2002).
- 6 [Tarsey v. Dunes Hotel, Inc.](#), 75 Nev. 364, 343 P.2d 910 (1959).
- 7 [State ex rel. Tinti v. Circuit Court for Waukesha County, Branch 2](#), 159 Wis. 2d 783, 464 N.W.2d 853 (Ct. App. 1990).
- 8 [Fry v. Tucker](#), 146 Tex. 18, 202 S.W.2d 218 (1947).
- 9 [Cantu v. State](#), 802 S.W.2d 349 (Tex. App. San Antonio 1990), petition for discretionary review refused, (May 1, 1991).
- 10 [State v. Dunsmore](#), 2015 MT 108, 378 Mont. 514, 347 P.3d 1220 (2015).
- 11 [Gray v. Berg](#), 2015 ND 203, 868 N.W.2d 378 (N.D. 2015).
- 12 [In re Marriage of O'Brien](#), 2011 IL 109039, 354 Ill. Dec. 715, 958 N.E.2d 647 (Ill. 2011).
- 13 [Jones v. Jones](#), 132 Mich. App. 497, 347 N.W.2d 756 (1984).

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